NO. 82-5109

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

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SUPREME COURT, U.S.

ROBERT RIVERA

Petitioner

vs.

THE STATE OF OHIO

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTIONS OF LAW

Respondent submits that the question presented by the record in this case is more properly stated as follows:

1. Due process and double jeopardy clauses do not preclude the State from prosecuting a defendant for receiving stolen property, aggravated robbery and intimidation under two indictments even though the events giving rise to the indictments constitutes the same course of criminal conduct.

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TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed but remanded the convictions with instructions. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right for the reason that no substantial constitutional question exists in this case.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court.

No substantial federal question is therefore presented by the petition for certiorari.

STATEMENT OF THE CASE

On August 13, 1980, petitioner was arrested in connection with the aggravated robbery of Francis J. Kelly. A one count indictment alleging the offense of receiving stolen property, Ohio Revised Code, Section 2913.51, was handed down by the Cuyahoga County Grand Jury on August 26, 1980 in Case No. CR 57967. Petitioner plead guilty to the indictment on September 26, 1980. On October 7, 1980, petitioner was indicted for receiving stolen property, aggravated robbery and intimidation in Case No. CR 59299. All the counts of the indictments relate to events surrounding the aggravated robbery of Kelly on August 13, 1980.

On April 21, 1981, count number one of indictment in CR 59299, receiving stolen property, was nolled upon the motion of the respondent. A hearing was had before Judge Thomas Matia upon petitioner's motion to dismiss counts two and three of the indictment, aggravated robbery and intimidation. This motion was overruled by the Court and his appeal to the Court of Appeals followed. On December 24, 1981, that Court affirmed the judgment of the trial court. The Ohio Supreme Court overruled petitioner's motion to grant jurisdiction on April 28, 1982.

STATEMENT OF FACTS

Respondent alleges that on August 13, 1980, petitioner robbed Francis J. Kelly at knife point of $130.00, his motorcycle, and the title thereto. Before the robbery, petitioner had told Kelly that he had received a parking ticket for illegally parking at a bar that both men had been at earlier. Based on the victim's description and information from the ticketing officer's description, petitioner was arrested. Kelly contends that petitioner telephoned him from jail and threatened to kill him if he cooperated with the police. Kelly relayed this information to police and refused to prosecute. After the indictment for receiving stolen property (to-wit: the title to a motorcycle) was handed down in CR 57967, Kelly indicated he was willing to prosecute.

REASONS FOR DENYING THE WRIT.

1. Due process and double jeopardy clauses do not preclude the State from prosecuting a defendant for receiving stolen property, aggravated robbery and intimidation under two indictments even though the events giving rise to the indictments constitutes the same course of criminal conduct.

Respondent asserts that no fundamental constitutional issues exist in the instant case. Petitioner claims the two separate indictments handed down by the Grand Jury constitute a violation of the principles of double jeopardy and collateral estoppel. He further alleges that the successive indictments were an intentional, precedural maneuver on the part of respondent to "enhance" the penalty petitioner faces as a result of his actions. Each of these arguments will be dealt with separately.

Double Jeopardy

The three charges of concern here are receiving stolen property, Ohio Revised Code, Section 2913.51; aggravated robbery, Ohio Revised Code, Section 2911.01; and, intimidation, Ohio Revised Code, Section 2921.03. The statute regarding intimidation reads, in pertinent part, as follows: "No person, knowingly and by force or by unlawful threat of harm, shall attempt to influence, intimidate, or hinder a . . . witness in the discharge of his duty." No logical double jeopardy argument can be made regarding this offense and the two previous offenses to the effect that they are lesser included offenses or share common elements. The thrust of petitioner's argument in this area is that the offense of receiving stolen property is a lesser included offense of aggravated robbery, and as such, a plea to the former precludes prosecution of the latter.

The provisions in the law relating to double jeopardy come into play when a defendant is placed in jeopardy more than once as a result of a specific criminal act. Such is not the case here. The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall ". . . be subject for the same offense to be twice put in jeopardy of life or limb . . ." United States Constitution Amendment Five (emphasis added). In Blockburger v. United States, 284 U.S. 299 (1932), the

Court established the "same evidence test" for defining the phrase "same offense". The test utilized to determine whether one or two offenses exist in a multiple count indictment is whether each count of the offense requires proof of a fact which the others do not. Id. at 304. In the case at hand, the offense of aggravated robbery, Ohio Revised Code, Section 2911.01, requires the State to prove that the petitioner had a knife on his person or under his control when attempting or committing or fleeing after a theft offense upon one Francis Kelly. The State must prove that Kelly was robbed of his motorcycle and cash. The offense of receiving stolen property, Ohio Revised Code, Section 2913.51, to which petitioner plead guilty, required the State to prove petitioner did receive, retain, or dispose of a certificate of title, the property of Francis Kelly, knowing or having reasonable cause to believe it had been obtained through the commission of a theft offense. Each of the above offenses obviously require proof of material facts that the other does not.

Petitioner asserts that the case of State v. Stone (Cuy. Cty. Ct. App., 1976) No. 35340 is controlling in the instant case with regard to his claim of double jeopardy. In Stone, the defendant, along with several other co-defendants, was indicted for the sale of heroin. He was found guilty of this offense. Defendant was also separately indicted for sale of cocaine and carrying a concealed weapon. These indictments were dismissed by the Common Pleas Court for lack of speedy trial. Subsequently, the defendant was indicted for possession of heroin for sale. All three indictments arose from the same course of criminal conduct. The Court reiterated the status of Ohio law in refusing to adopt the "same transaction" test. In Brown v. Ohio, 97 S. Ct. at 2227 (1977), Justice Brennan, in a concurring opinion, had advocated the adoption of the "same transaction" test which would require the State, in one prosecution, to proceed on all charges against a defendant arising out of a single transaction. The majority in Brown refused to adopt such a test, instead relying on the standards enumerated in Blockburger, supra, for defining "same offense" in cases involving multiple trials:

> "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not . . ."

Brown, at 2225. The Court in Stone, supra, upheld petitioner's double jeopardy claim as the third indictment would have been dismissed for failure to comply with speedy trial requirements if it had been brought at the time of the second indictments. The Court at no time addressed the propriety of indicting the offense alleged against the petitioner under two separate indictments. Stone does not adopt the "same transaction" test nor do any similarity of facts exist between Stone and the instant case.

The Court of Appeals in the instant case found the offense of receiving stolen property, to which petitioner plead guilty, to be an allied offense of similar import to the offense of aggravated robbery as alleged in the second indictment under the allied offense statute, Ohio Revised Code, Section 2941.25. Subsection A of that section provides that if the same conduct of a defendant constitutes two or more allied offenses of similar import, the defendant may be convicted of only one. The statute does not preclude indictment and trial on the multiple offenses charged. Indeed the issue of the existence of allied offenses arises only upon conviction of more than one offense. The allied offenses statute is a sentencing statute. Maumee v. Geiger, 45 Ohio St. 2d 238 (1976).

Collateral Estoppel

Petitioner contends that the doctrine of collaterial estoppel precludes prosecution in Case No. CR 59299.

The doctrine of collateral estoppel prevents the relitigation of an issue necessarily decided in defendant's favor at the first trial, even where the two offenses are different. Ashe v. Swanson, 397 U.S. 436 at 443 (1970). In the instant case, the petitioner's plea of guilty to receiving stolen property in Case No. CR 57967 precludes the application of this doctrine as no issue could be construed as having been resolved in the petitioner's favor by his plea of guilty. Even if the petitioner had been found not guilty at trial on this offense, the subsequent indictment and trial would not violate either the

doctrine of collateral estoppel or double jeopardy as the offense charged in the subsequent indictment are completely separate offenses from receiving stolen property, without identical, essential issues of fact.

Successive Indictments

Petitioner contends that prosecution on the aggravated robbery and intimidation indictments in CR 59299 must be precluded as they "could have" been brought at the same time as the indictment for receiving stolen property in CR 57967. Petitioner would have one think compulsory joinder is the law in Ohio. The State is not obligated to bring at one time all potential charges against a defendant which arises from the same criminal act, although that is usually the case. The State is also interested in the efficient administration of justice. In the case at hand, petitoner's unlawful activity was the reason two separate indictments were handed down. For him to turn now and bemoan this as injustice, when his actions gave rise to the multiple indictments, is to make a mockery of our judicial system. Petitioner asserts that the case of Harris v. Oklahoma, 433 U.S. 682, 53 L. Ed. 2d 1052 precludes separate trials because the State could have tried the defendant for murder and robbery at one time and thus acknowledged the defendant's claim of double jeopardy. In Harris, the Court held that when conviction for a greater crime cannot be had without conviction of the lesser crime, the defendant may not be prosecuted for the lesser offense after conviction for the greater. The double jeopardy clause precludes prosecution as proof of the underlying felony is needed to prove the intent necessary for a felony murder conviction. Justice Brennan advocated the adoption of the principle of mandatory joinder in Harris. However, mandatory joinder has never been adopted by the majority of the United States Supreme Court or Ohio Supreme Court.

CONCLUSION

Petitioner assumes that conviction of the offense of receiving stolen property precludes prosecution on the later indictments. As has been shown

here, receiving stolen property is not a lesser included offense of aggravated robbery for purposes of double jeopardy. Essential identical issues of fact do not exist. At best, they are allied offenses. Prosecution on the indictment for intimidation cannot be precluded by means of any rational argument. Even if compulsory joinder were the rule in Ohio, it is unconceivable that a Court would permit the defendant to escape prosecution because of his wrongful act.

This case does not involve constitutional principles, but statutory construction and intent.

Respondent moves this Honorable Court to deny petitioner's writ of certiorari.

Respectfully submitted,

JOHN T. CORRIGAN, Prosecuting Attorney
of Cuyahoga County, Ohio

BY: Patricia A. Cleary
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SERVICE

A copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari was mailed this 16th day of August, 1982, to Stephen Walker, Attorney for Petitioner, Western Reserve Building, Suite 840, 1468 West Ninth Street, Cleveland, Ohio 44113.

Patricia A. Cleary
Assistant Prosecuting Attorney

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AFFIDAVIT OF FILING

I, John T. Corrigan, being first duly cautioned and sworn, deposes and says that I am a member of the bar of this Court and otherwise competent to execute this affidavit, pursuant to Rule 28.2, Rules of the United States Supreme Court. On the sixteenth day of August, 1982, I caused to be sent by first class, prepaid United States mail, to the Clerk of Court, United States Supreme Court, 1 First Street, Washington, D.C., 20543, one copy of the Brief in Opposition to Petition for a Writ of Certiorari to the United States Supreme Court in the above captioned matter. Such mailing was made within the time permitted by this Court for such a filing.

John T. Corrigan

JOHN T. CORRIGAN, Prosecuting Attorney
The Justice Center, 1200 Ontario Street
Cleveland, Ohio 44113 (216) 443-7747
Attorney for Respondent

SWORN to before me and subscribed in my presence this 13th day of August, 1982.

Sheila K. Burt

NOTARY PUBLIC

SHEILA K. BURT
Notary Public, State of Ohio - Cuya. Cty
My Commission Expires Jan. 15, 1986

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 35340

STATE OF OHIO, APPEAL FROM

COMMON PLEAS COURT

APPELLEE No. 18564-Cr.

-vs-

VIRGIL STONE, JOURNAL ENTRY

APPELLANT

DATE NOV 24 1976

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

The defendant-appellant was arrested in the early morning hours of May 15, 1974, during the course of a narcotics raid in the City of Cleveland. He was found leaving an automobile parked immediately outside of the residence in which the raid was conducted. An officer patted him down and discovered a .45 caliber semi-automatic Colt revolver and a vial containing 40.7 grams of heroin. A second pat-down was conducted by another officer and an additional vial containing 8.3 grams of cocaine was removed from Stone's person. While completing

the arrests inside the residence, the police discovered and confiscated an attache case containing a kilogram of heroin. Also inside the attache case were personal papers and business documents belonging to the defendant-appellant.

Subsequently, on the 25th day of May, 1974, various indictments were returned against five defendants. In case CR 13983, the defendants were indicted for the sale of heroin. A separate indictment was returned against the defendant-appellant in CR 13984 for possession for sale of cocaine and carrying a concealed weapon. The defendant-appellant was found guilty of the possession for sale of heroin involving the kilogram discovered in the residence, and sentence was imposed for this offense. Subsequent to this conviction and the incarceration of the defendant-appellant, the charges alleged in the second case, CR 13984, possession for sale of cocaine and carrying a concealed weapon were dismissed by the Court of Common Pleas of Cuyahoga County for lack of a speedy trial. Appeal was taken to the Court of Appeals of this district and the Court of Appeals dismissed for failure to file the appeal in a timely fashion. This dismissal was entered on January 23, 1975. On February 16, 1975, the State of Ohio then indicted the defendant-appellant for the alleged possession of heroin for sale, alleging that the defendant-appellant had possessed heroin along with the cocaine and the gun charges which had been previously dismissed by the Court of Common Pleas and whose dismissal had been sustained by this Court of Appeals.

A trial of the new charge contained in the indictment of February 16, 1975, known as CR 18564, was held on August 26, 1975, and the defendant was found guilty of possession of heroin, a lesser included offense.

The defendant-appellant has brought this appeal on three assignments of error:

"I. The double jeopardy provision of the Constitution protects defendants from harrassment and redundant litigation.

"II. Due process requires that all the known charges 'based on the same conduct or arising out of the same criminal episode be tried together.'

"III. Due process requires dismissal of an indictment for pre-accusation delay when the statutory periods are exceeded or it can be demonstrated that the delay caused actual prejudice."

Addressing ourselves to the first of the assignments of error, the court is constrained to consider the effect of Crim. R. 8 on the circumstances of this case. Crim. R. 8 provides that:

"(A) Joinder of offenses. Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.

"(B) Joinder of defendants. Two or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses, or in the same course of criminal conduct. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count."

It should be observed that the language of the rule is permissive rather than mandatory. It has long been the rule that felonies and misdemeanors may be joined in one indictment so long as each offense is a separate count. Becker v. State (1930), 39 Ohio App. 496. While the Ohio law does not require that related offenses be joined, the U.S. Supreme Court has included the doctrine of collateral estoppel within the protection of the double jeopardy rule. A failure to join some related offenses in one trial under this doctrine may preclude the state from subsequent prosecutions. Ashe v. Swenson (1970), 397 U.S. 436.

In Green v. United States (1957), 355 U.S. 184, 78 S. Ct. 221, the court said:

> "[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."

In Commonwealth v. Campana (1973), 452 Pa. 233, 304 A. 2d 432, vacated on other grounds, 414 U.S. 808, 94 S. Ct. 73, on remand, 455 Pa. 622, 314 A. 2d 854, cert. den. 417 U.S. 969, 94 S. Ct. 3172, the Supreme Court of Pennsylvania adopted the "same transaction" test requiring the prosecution to bring in a single proceeding all the known charges arising from a single criminal episode. Although this court has rejected that test, see State v. Williams and Cunningham (Ct. App. Eighth Dist., Case No. 35276, November 18, 1976), it agrees with Judge Nix's concurring opinion in the Campana case. Judge Nix urged the adoption of the American Law Institute Model Penal Code rule on joinder, for public policy reasons. That rule is as follows:

> "...a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court." [U.L.A. §1.07 (2)].

The indictment of May 21, 1974, CR 13984, was determined by the State of Ohio to have "inadvertently" omitted the charge of possession for sale of heroin. The question raised is whether or not this "inadvertence" should be utilized as a justification for a subsequent indictment after the charges contained in the original indictment have been dismissed. The basis for the dismissal of these charges was the failure of the state to accord the defendant a speedy trial. Clearly, had the original indictment contained an additional charge, which was inadvertently or deliberately omitted, the same basis for dismissal

would have been applicable. To permit the state to reindict the defendant under these circumstances is to place a premium upon the original failure of the appellee. This would be a violation of the purpose of the criminal law which is to assure justice to every defendant, no matter how flagitious may be his crime. For these reasons, we find assignment of error number one to be well taken.

Having disposed of this assignment of error, which requires a reversal of the judgment heretofore entered by the lower court, we observe that assignments of error numbers two and three are basically disposed of by this determination and are well taken. The conviction is vacated and the case is remanded for further proceedings according to law.

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CLERK OF COURTS

No other error appearing in the record, the conviction is vacated and the case is remanded to the Common Pleas Court for further proceedings according to law. It is, therefore, considered that said appellant(s) recover of said appellee(s) his costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

KRENZLER, P.J., DISSENTS.

STILLMAN, J.,

*SILBERT, J. CONCUR.

PRESIDING JUDGE
ALVIN I. KRENZLER

*(SILBERT, J., Retired of the 8th Appellate District, sitting by assignment.)
For plaintiff-appellee: John T. Corrigan
For defendant-appellant: James R. Willis

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.